

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

8 JUAN JOSE ALVARADO, )  
9 Plaintiff, ) No. CV-07-3096-JPH  
10 v. ) ORDER GRANTING DEFENDANT'S  
11 MICHAEL J. ASTRUE, ) MOTION FOR SUMMARY JUDGMENT  
12 Commissioner of Social )  
13 Security, )  
14 Defendant. )  
15 )

16 BEFORE THE COURT are cross-Motions for Summary Judgment (Ct.  
17 Rec. 22, 24). Attorney D. James Tree represents Plaintiff;  
18 Assistant United States Attorney Frank A. Wilson and Special  
19 Assistant United States Attorney David R. Johnson represent  
20 Defendant. The parties have consented to proceed before a  
21 magistrate judge. (Ct. Rec. 8.) After reviewing the administrative  
22 record and briefs filed by the parties, the court **GRANTS** Defendant's  
23 Motion for Summary Judgment (Ct. Rec. 24). Plaintiff's Motion for  
24 Summary Judgment (Ct. Rec. 22) is **DENIED**.

## JURISDICTION

26 On February 22, 2005, plaintiff Juan Alvarado (Plaintiff)  
27 protectively filed an application for supplemental security income  
28 (SSI). (Tr. 69-71.) Plaintiff alleged disability due to diabetes

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FOR SUMMARY JUDGMENT-1

1 mellitus, cellulitis, neuropathy, back and left shoulder pain,  
2 vision problems, skin infections, and mental impairments, with an  
3 onset date of November 1, 2001. (Tr. 69, 81-82.) Benefits were  
4 denied initially and on reconsideration. (Tr. 40-42, 44-47.)  
5 Plaintiff requested a hearing before an administrative law judge  
6 (ALJ), which was held before ALJ Peter J. Baum on October 19, 2006.  
7 (Tr. 349-373.) At the hearing, Plaintiff, who was represented by  
8 counsel, testified, as did vocational expert (VE) Scott Witmer. The  
9 ALJ denied benefits and the Appeals Council denied review. (Tr. 4-  
10 7, 14-20.) The instant matter is before this court pursuant to 42  
11 U.S.C. § 405(g).

12 **STATEMENT OF FACTS**

13 The facts of the case are set forth in detail in the transcript  
14 of proceedings, and are briefly summarized here. Plaintiff was 39  
15 years old at the time of the hearing. He completed the ninth grade.  
16 (Tr. 351.) Plaintiff has past relevant work as a garage mechanic  
17 and farm laborer. (Tr. 352.) He testified he was laid off on  
18 October 31, 2001, because after lunch he became dizzy or sleepy and  
19 could not keep up with his work as a mechanic. (*Id.*)

20 **SEQUENTIAL EVALUATION PROCESS**

21 The Social Security Act (the "Act") defines "disability" as the  
22 "inability to engage in any substantial gainful activity by reason  
23 of any medically determinable physical or mental impairment which  
24 can be expected to result in death or which has lasted or can be  
25 expected to last for a continuous period of not less than twelve  
26 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also  
27 provides that a Plaintiff shall be determined to be under a  
28 disability only if any impairments are of such severity that a

1 Plaintiff is not only unable to do previous work but cannot,  
2 considering Plaintiff's age, education and work experiences, engage  
3 in any other substantial gainful work which exists in the national  
4 economy. 42 U.S.C. §§ 423 (d)(2)(A), 1382c(a)(3)(B). Thus, the  
5 definition of disability consists of both medical and vocational  
6 components. *Edlund v. Massanari*, 253 F. 3d 1152, 1156 (9<sup>th</sup> Cir.  
7 2001).

8 The Commissioner has established a five-step sequential  
9 evaluation process for determining whether a person is disabled. 20  
10 C.F.R. §§ 404.520, 416.920. Step one determines if the person is  
11 engaged in substantial gainful activities. If so, benefits are  
12 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(i). If not,  
13 the decision maker proceeds to step two, which determines whether  
14 Plaintiff has a medically severe impairment or combination of  
15 impairments. 20 C.F.R. §§ 404. 1520(a)(4)(ii), 416.920(a)(4)(ii).

16 If Plaintiff does not have a severe impairment or combination  
17 of impairments, the disability claim is denied. If the impairment  
18 is severe, the evaluation proceeds to the third step, which compares  
19 Plaintiff's impairment with a number of listed impairments  
20 acknowledged by the Commissioner to be so severe as to preclude  
21 substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(ii),  
22 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P, App. 1. If the  
23 impairment meets or equals one of the listed impairments, Plaintiff  
24 is conclusively presumed to be disabled. If the impairment is not  
25 one conclusively presumed to be disabling, the evaluation proceeds  
26 to the fourth step, which determines whether the impairment prevents  
27 Plaintiff from performing work which was performed in the past. If  
28 a Plaintiff is able to perform previous work, that Plaintiff is

1 deemed not disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv),  
 2 416.920(a)(4)(iv). At this step, Plaintiff's residual functional  
 3 capacity ("RFC") assessment is considered. If Plaintiff cannot  
 4 perform this work, the fifth and final step in the process  
 5 determines whether Plaintiff is able to perform other work in the  
 6 national economy in view of Plaintiff's residual functional  
 7 capacity, age, education and past work experience. 20 C.F.R. §§  
 8 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137  
 9 (1987).

10 The initial burden of proof rests upon Plaintiff to establish  
 11 a *prima facie* case of entitlement to disability benefits. *Rhinehart*  
 12 *v. Finch*, 438 F. 2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v. Apfel*, 172  
 13 F. 3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is met once  
 14 Plaintiff establishes that a physical or mental impairment prevents  
 15 the performance of previous work. The burden then shifts, at step  
 16 five, to the Commissioner to show that: (1) Plaintiff can perform  
 17 other substantial gainful activity, and (2) a "significant number of  
 18 jobs exist in the national economy" which Plaintiff can perform.  
 19 *Kail v. Heckler*, 722 F. 2d 1496, 1498 (9<sup>th</sup> Cir. 1984).

#### 20 **STANDARD OF REVIEW**

21 Congress has provided a limited scope of judicial review of a  
 22 Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold  
 23 the Commissioner's decision, made through an ALJ, when the  
 24 determination is not based on legal error and supported by  
 25 substantial evidence. See *Jones v. Heckler*, 760 F. 2d 993, 995 (9<sup>th</sup>  
 26 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).  
 27 "The [Commissioner's] determination that a plaintiff is not disabled  
 28 will be upheld if the findings of fact are supported by substantial

1 evidence." *Delgado v. Heckler*, 722 F. 2d 570, 572 (9<sup>th</sup> Cir. 1983)  
 2 (citing 42 U.S.C. § 405(g)). Substantial evidence is more than a  
 3 mere scintilla, *Sorenson v. Weinberger*, 514 F. 2d 1112, 1119 n. 10  
 4 (9<sup>th</sup> Cir. 1975), but less than a preponderance. *McAllister v.*  
 5 *Sullivan*, 888 F. 2d 599, 601-602 (9<sup>th</sup> Cir. 1989); *Desrosiers v.*  
 6 *Secretary of Health and Human Services*, 846 F. 2d 573, 576 (9<sup>th</sup> Cir.  
 7 1988). Substantial evidence "means such evidence as a reasonable  
 8 mind might accept as adequate to support a conclusion." *Richardson*  
 9 *v. Perales*, 402 U.S. 389, 401 (1971)(citations omitted). "[S]uch  
 10 inferences and conclusions as the [Commissioner] may reasonably draw  
 11 from the evidence" will also be upheld. *Mark v. Celebrezze*, 348 F.  
 12 2d 289, 293 (9<sup>th</sup> Cir. 1965). On review, the court considers the  
 13 record as a whole, not just the evidence supporting the decision of  
 14 the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir.  
 15 1989)(quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

16 It is the role of the trier of fact, not this court, to resolve  
 17 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence  
 18 supports more than one rational interpretation, the court may not  
 19 substitute its judgment for that of the Commissioner. *Tackett*, 180  
 20 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).  
 21 Nevertheless, a decision supported by substantial evidence will  
 22 still be set aside if the proper legal standards were not applied in  
 23 weighing the evidence and making the decision. *Brawner v. Secretary*  
 24 *of Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1988).  
 25 Thus, if there is substantial evidence to support the administrative  
 26 findings, or if there is conflicting evidence that will support a  
 27 finding of either disability or nondisability, the finding of the  
 28 Commissioner is conclusive. *Sprague v. Bowen*, 812 F. 2d 1226, 1229-

1 1230 (9<sup>th</sup> Cir. 1987).

2 **ADMINISTRATIVE DECISION**

3 At the onset the ALJ noted plaintiff filed three claims  
 4 previously: October 16, 1996, March 18, 2002, and November 5, 2002.  
 5 (Tr. 14.) The claim protectively filed on November 5, 2002, was  
 6 initially denied on June 5, 2003, subject to possible reopening but  
 7 denied because there was no new material evidence. The ALJ opines  
 8 that the March of 2002 and October of 1996 claims are too old to  
 9 reopen as there is no evidence of fraud or error on the face of  
 10 either denial. Accordingly, the ALJ found that the current issue is  
 11 disability since February 22, 2005, the protective filing date.  
 12 (*Id.*)

13 At step one, the ALJ found plaintiff worked after his  
 14 protective filing date of February 22, 2005, but "did not earn  
 15 enough to qualify as substantial gainful activity." (Tr. 15.) At  
 16 steps two and three, ALJ Baum found plaintiff had impairments of  
 17 diabetes mellitus with peripheral neuropathy, probable borderline  
 18 intellectual functioning, and back pain, which are severe, but do  
 19 not meet the requirements of any Listed impairments. (Tr. 18.) He  
 20 found that plaintiff has the RFC for a significant range of light  
 21 work. (Tr. 17.) With respect to mental impairments, plaintiff is  
 22 limited to performing simple tasks. (Tr. 19.) At step four,  
 23 relying on the VE's testimony, the ALJ found that plaintiff is  
 24 unable to perform his past relevant work as a garage mechanic or  
 25 farm laborer. (Tr. 17.) At step five, also relying on the VE, the  
 26 ALJ found plaintiff can perform other work, including electrical  
 27 assembly. (Tr. 18.) The ALJ found plaintiff was, therefore, not  
 28 under a "disability" as defined by the Social Security Act. (Tr.

1 18-20.)

2 **ISSUES**

3 The question is whether the ALJ's decision is supported by  
 4 substantial evidence and free of legal error. Plaintiff argues the  
 5 ALJ erred in failing to develop the record, weighing the medical  
 6 evidence, and meeting his burden at step five. (Ct. Rec. 23 at 11-  
 7 12.) The Commissioner responds that the ALJ's decision is without  
 8 error, with one exception: the ALJ erred at step one because  
 9 plaintiff's income in the year of filing (2005), meets the  
 10 definition of substantial gainful activity. (Ct. Rec. 25 at 5; fn  
 11 1.) The Commissioner argues that if the Court does not affirm the  
 12 ALJ's decision, the Court should affirm based on a modified step one  
 13 finding. Plaintiff's reply brief does not address the  
 14 Commissioner's argument. (Ct. Rec. 26.) In the interests of  
 15 judicial economy, the Court addresses plaintiff's arguments first.

16

17 **DISCUSSION**

18 **A. Weighing the medical evidence**

19 Plaintiff alleges that the ALJ failed to properly weigh the  
 20 opinion of treating physician Mark Sauerwein, M.D., on April 21,  
 21 2004, that plaintiff "is not able to be productive in any kind of  
 22 job situation at this point because his diabetes is in such poor  
 23 control." (Ct. Rec. 23 at 15-16 and 26 at 4-5, referring to Tr.  
 24 281). The Commissioner responds that the ALJ appropriately  
 25 considered Dr. Sauerwein's medical opinions but was not required to  
 26 credit his vocational opinion. (Ct. Rec. 25 at 10-12.)

27 A treating physician's opinion is given special weight because  
 28 of familiarity with the claimant and the claimant's physical

1 condition. *Fair v. Bowen*, 885 F. 2d 597, 604-05 (9<sup>th</sup> Cir. 1989).  
 2 Thus, more weight is given to a treating physician than an examining  
 3 physician. *Lester v. Cater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1996).  
 4 Correspondingly, more weight is given to the opinions of treating  
 5 and examining physicians than to nonexamining physicians. *Benecke*  
 6 *v. Barnhart*, 379 F. 3d 587, 592 (9<sup>th</sup> Cir. 2004). If the treating or  
 7 examining physician's opinions are not contradicted, they can be  
 8 rejected only with clear and convincing reasons. *Lester*, 81 F. 3d  
 9 at 830. If contradicted, the ALJ may reject an opinion if he states  
 10 specific, legitimate reasons that are supported by substantial  
 11 evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44 F.  
 12 3d 1435, 1463 99<sup>th</sup> Cir. 1995).

13 In addition to the testimony of a nonexamining medical advisor,  
 14 the ALJ must have other evidence to support a decision to reject the  
 15 opinion of a treating physician, such as laboratory test results,  
 16 contrary reports from examining physicians, and testimony from the  
 17 claimant that was inconsistent with the treating physician's  
 18 opinion. *Magallanes v. Bowen*, 881 F.2d 747, 751-52 (9<sup>th</sup> Cir. 1989);  
 19 *Andrews v. Shalala*, 53 F.3d 1042-43 (9<sup>th</sup> Cir. 1995).

20 The ALJ notes that in an earlier opinion [on July 8, 2002], Dr.  
 21 Sauerwein diagnosed mild degenerative disc disease of the  
 22 thoracolumbar spine, and suggested plaintiff avoid jobs with  
 23 repetitive stooping and bending but opined that plaintiff "does not  
 24 meet the criteria for substantial disability." (Tr. 16, referring  
 25 to Tr. 320.)

26 The ALJ considered the opinion of examining physician Saleem  
 27 Khamisani, M.D., when he weighed Dr. Sauerwein's opinions. On May  
 28 19, 2003, Dr. Khamisani notes plaintiff was diagnosed with diabetes

1 four years earlier. His blood sugars and diet were poorly  
2 controlled but plaintiff complied with taking the medications  
3 prescribed for diabetes. (Tr. 245.) Plaintiff took no additional  
4 medication except an anti-inflammatory. (Id.) Dr. Khamisani  
5 diagnosed poorly controlled diabetes mellitus with moderate  
6 peripheral neuropathy and recurrent superficial skin infections,  
7 chronic AC separation at the left shoulder with restricted range of  
8 motion, and chronic low back pain, probably secondary to  
9 degenerative arthritis, with no evidence of radiculopathy. (Tr.  
10 248.) The ALJ notes that Dr. Khamisani opined plaintiff should  
11 avoid: (1) working in a dark environment; close proximity to heavy  
12 machinery; and extremes of temperature due to diabetic peripheral  
13 neuropathy; (2) using the left arm at or above shoulder height or  
14 lifting more than ten to 15 pounds with the left arm due to chronic  
15 acromioclavicular separation of the left shoulder area; (3)  
16 repetitive bending, twisting, stooping and squatting due to the  
17 possibility of degenerative arthritis of the lumbar spine; and (4)  
18 unprotected heights due to diabetic neuropathy. (Tr. 16, referring  
19 to Tr. 248.) The ALJ observes that these limitations are not more  
20 restrictive than those assessed by Dr. Sauerwein in 2002. (Tr. 16.)

21 When weighing the medical evidence, the ALJ considered  
22 plaintiff's credibility, and found him less than completely  
23 credible. (Tr. 16-17). Credibility determinations bear on the  
24 evaluation of medical evidence when an ALJ is presented with  
25 conflicting medical opinions. *Webb v. Barnhart*, 433 F. 3d 683, 688  
26 (9<sup>th</sup> Cir. 2005).

27 ALJ Baum found plaintiff less than fully credible because his  
28 daily activities are inconsistent with allegations of total

1 disability, and his subjective complaints are inconsistent with the  
2 medical treatment he receives. (Tr. 17.) The ALJ points to  
3 plaintiff's statements that he has no problems with personal care,  
4 does some household chores, goes out every day, drives, shops about  
5 three times a week, handles money, watches television, barbeques  
6 with family, regularly walks, and attends church; however, he does  
7 not deal well with stress. (Tr. 16, citing Exhibit E.) The ALJ  
8 opines that plaintiff's broad range of daily activity is  
9 inconsistent with a finding of total disability. (*Id.*) It is well-  
10 established that the nature of daily activities may be considered  
11 when evaluating credibility. *Fair v. Bowen*, 885 F. 2d 597, 603 (9<sup>th</sup>  
12 Cir. 1989).

13 The ALJ found plaintiff's medical treatment inconsistent with  
14 his subjective complaints. Plaintiff alleged that he is in constant  
15 pain but treats his pain "with only ibuprofen and has not sought  
16 more aggressive pain treatment." (Tr. 17.) This is a permissible  
17 reason to discount credibility. See *Para v. Astrue*, 481 F. 3d 742,  
18 750-51 (9<sup>th</sup> Cir. 2007)(evidence of 'conservative treatment' is  
19 sufficient to discount a claimant's testimony regarding severity of  
20 an impairment); see also *Meanel v. Apfel*, 172 F. 3d 1111, 1114 (9<sup>th</sup>  
21 Cir. 1999)(rejecting subjective pain complaints where petitioner's  
22 "claim that she experienced pain approaching the highest level  
23 imaginable was inconsistent with the 'minimal, conservative  
24 treatment' that she received").

25 The ALJ properly weighed the medical evidence, including the  
26 contradictory opinions of Drs. Sauerwein and Khamisani, as well as  
27 those of the reviewing agency physicians. He considered plaintiff's  
28 credibility when he weighed the medical evidence, and gave clear and

1 convincing reasons supported by the record for his credibility  
 2 assessment. The ALJ's assessment of the medical evidence is  
 3 supported by the evidence and free of legal error.

4 **B. Duty to Develop the Record**

5 Plaintiff alleges the ALJ failed to develop the record with  
 6 respect to his psychological impairments, specifically, by failing  
 7 to order IQ testing after Dr. Toews assessed probable borderline  
 8 intellectual functioning. (Ct. Rec. 23 at 14-15.) Plaintiff  
 9 contends that such testing may reveal that he meets the requirements  
 10 of Listing 12.05. (Ct. Rec. 23 at 14.) The Commissioner responds  
 11 that the ALJ was not required to order IQ testing because a  
 12 diagnosis of mental retardation is required to meet or equal this  
 13 Listing, regardless of IQ scores, and plaintiff has never been  
 14 diagnosed with mental retardation. (Ct. Rec. 25 at 6-9.)

15 In Social Security cases, the ALJ has a special duty to develop  
 16 the record fully and fairly and to ensure that the claimant's  
 17 interests are considered, even when the claimant is represented by  
 18 counsel. *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001);  
 19 *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir.1983). An ALJ's duty  
 20 to develop the record further is triggered only when there is  
 21 ambiguous evidence or when the record is inadequate to allow for  
 22 proper evaluation of the evidence. *Tonapetyan v. Halter*, 242 F.3d  
 23 at 1150.

24 The ALJ notes that plaintiff was evaluated for mental  
 25 impairments by an examining mental health professional. (Tr. 16.)  
 26 On September 9, 2005, Jay Toews, Ed. D., interviewed plaintiff and  
 27 performed a mental status exam. No records were available for  
 28 review. (Tr. 259.) Dr. Toews notes plaintiff was not receiving

1 mental health care. Plaintiff was laid off as a mechanic in 2002  
 2 because business was slow. He did not believe that he had current  
 3 psychiatric problems, and had no history of either psychiatric  
 4 problems or treatment. Plaintiff described being "fairly active  
 5 physically." (Tr. 259-260.) Dr. Toews observes: it "appears he is  
 6 engaging in some physical activity," due to dirt and embedded grease  
 7 on both hands. (Tr. 261.) Plaintiff attends church, and likes to  
 8 fix and refinish things. (Tr. 260.) His mood was mildly dysphoric.  
 9 Dr. Toews opined that there are no psychological barriers to  
 10 employability. He diagnosed a mood disorder NOS, related to medical  
 11 problems, probable borderline intellectual functioning, physical  
 12 impairments by history, and assessed a GAF of 62.<sup>1</sup> (Tr. 261-262.)

13 On October 5, 2005, agency psychologist Mary Gentile, Ph. D.,  
 14 conducted a record review. (Tr. 209-222.) The ALJ observes that  
 15 she assessed mild or no restrictions caused by mental impairments.  
 16 (Tr. 16, referring to Tr. 219.)

17 The record before the ALJ was neither ambiguous nor inadequate  
 18 to allow for proper evaluation of the evidence.

19 Listing 12.05 concerns mental retardation, described as  
 20 significantly sub-average general intellectual functioning with  
 21 deficits in adaptive functioning initially manifested during the

22       <sup>1</sup>A Global Assessment of Functioning (GAF) of 62 indicates some  
 23 mild symptoms (e.g., depressed mood and mild insomnia) or some  
 24 difficulty in social, occupational or school functioning (e.g.,  
 25 occasional truancy, or theft within the household), but generally  
 26 functioning pretty well, has some meaningful interpersonal  
 27 relationships. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL  
 28 DISORDERS, 4<sup>th</sup> Ed., (DSM-IV), at 32.

1 developmental period; i.e., the evidence demonstrates or supports  
2 onset of the impairment before age 22. 20 C.F.R. § 404, Subpt. P,  
3 App. 1.

4 At step three, the ALJ found plaintiff's medically determinable  
5 impairments do not meet or medically equal one of the Listed  
6 impairments. (Tr. 15, 18.)

7 It is the claimant's responsibility to prove disability at step  
8 three of the sequential evaluation. 20 C.F.R. §§ 404.1520  
9 (a)(4)(iii), 404. 1520 (d). The claimant bears the burden of  
10 establishing his impairments satisfy the requirements of a Listings  
11 impairment. Tackett v. Apfel, 180 F. 3d 1094, 1098-1099 (9<sup>th</sup> Cir.  
12 1999). The Court finds that the second prong of the two-pronged  
13 test for Listing 12.05C is not met. Listing 12.05, subsection C  
14 provides that the required level of severity for this disorder  
15 exists when (1) the individual has a valid verbal, performance, or  
16 full scale IQ of 60 through 70, and (2) the individual has a  
17 physical or other mental impairment imposing an additional and  
18 significant work-related limitation of function.

19 Plaintiff fails to present adequate evidence that the  
20 limitations he suffers impose additional significant work related  
21 limitations of function. The second prong of the Listing is not  
22 met.

23 As noted, Dr. Toews assessed probable borderline intellectual  
24 functioning, but opined plaintiff has no psychological barriers to  
25 employment. No agency reviewing physician has opined that plaintiff  
26 has greater than mild mental impairments. The findings of the  
27 medical professionals are consistent with the ALJ's findings that  
28 plaintiff's probable borderline intellectual functioning and

1 residual functional capacity limit him to work requiring the  
 2 performance of simple tasks. (Tr. 19.) The record does not  
 3 describe a person with significantly sub-average general  
 4 intellectual functioning with deficits in adaptive functioning:  
 5 plaintiff's last job as a mechanic is listed with an SVP of 7,  
 6 meaning it was skilled work. (Tr. 366.) A review of the record  
 7 reveals that plaintiff's condition does not medically meet or equal  
 8 the criteria for Listing 12.05. The ALJ's step three finding is  
 9 without error, and because the evidence was clear rather than  
 10 ambiguous, he was not required to supplement the record.

**C. RFC assessment and step five hypothetical**

12 Plaintiff contends ALJ Baum erred in his RFC assessment and at  
 13 step five by failing to include all of plaintiff's medically  
 14 established impairments. (Ct. Rec. 23 at 16-16.) This is  
 15 essentially the same as plaintiff's first argument, that the ALJ  
 16 improperly weighed the medical evidence. For the reasons previously  
 17 articulated, the ALJ properly weighed the medical evidence.

18 Plaintiff argues that the ALJ found the only job he could  
 19 perform was a semi-skilled job and the ALJ failed to identify any  
 20 transferable skills to that job. (Ct. Rec. 26 at 5.) Plaintiff is  
 21 incorrect. The ALJ specifically found that plaintiff either has no  
 22 transferable skills from any past relevant work and/or  
 23 transferability of skills is not an issue in this case. (Tr. 17,  
 24 19.) The VE testified that the job of electrical assembler (SVP 3,  
 25 semi-skilled) does not require any skills plaintiff would not have  
 26 already acquired as a mechanic (SVP 7, skilled). (Tr. 370.)

**D. Alternative step one finding - substantial gainful activity**

28 The Commissioner argues that the ALJ erred at step one by

1 finding plaintiff had not engaged in substantial gainful activity  
 2 during the relevant time. The Commissioner asks the Court to modify  
 3 the ALJ's decision by changing the step one finding if the Court  
 4 otherwise reverses the ALJ's decision. Plaintiff does not address  
 5 this argument. The Court declines the Commissioner's request  
 6 because the ALJ's decision is otherwise without error.

7 Finding the ALJ's decision supported by the evidence and free  
 8 of legal error, the Court declines review of the ALJ's step one  
 9 analysis since any error is clearly harmless.<sup>2</sup>

10 **CONCLUSION**

11 The ALJ properly assessed credibility and weighed the medical  
 12 evidence. These determinations are supported by substantial  
 13 evidence and free of legal error.

14 Accordingly,

15 **IT IS ORDERED:**

16 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 24**) is  
 17 **GRANTED**.

18 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 22**) is

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19 <sup>2</sup>At the hearing the ALJ asked plaintiff's counsel:

20 "Do you contend that he was not performing substantial gainful  
 21 activity up until 2005 because the wages certainly wouldn't reflect  
 22 that?" (Tr. 367.) The ALJ pointed out that plaintiff's wages in  
 23 2005 were \$36,000, \$20,000 in 2004, and \$37,000 in 2001. (*Id.*)  
 24 Plaintiff's counsel acknowledged that it "looks like they were at  
 25 SGA levels," but added that he did not know how long the jobs had  
 26 lasted. Counsel indicated he wished to "just stick with what we've  
 27 got for now." (*Id.*)

1 **DENIED.**

2 The District Court Executive is directed to file this Order and  
3 provide a copy to counsel for Plaintiff and Defendant. Judgment  
4 shall be entered for Defendant and the file shall be **CLOSED**.

5 DATED August 7th, 2008.

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S/ JAMES P. HUTTON  
JAMES P. HUTTON  
8 UNITED STATES MAGISTRATE JUDGE  
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